

# ON STATUTORY OBSOLESCENCE

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With the enactment of the Uniform Commercial Code in all states except Louisiana, the problem of how we are going to live with the Code, so-called, over the next half century becomes worth thinking about. To help us with our thinking we have, fortunately, the accumulated experience of living with the Code's predecessors during the last half century.

It is true that the conditions of the first general codification of commercial law, which followed 1900, were by no means the same as the conditions of the second general codification—that is, the Code. In the intervening half century our legal system had suffered, or at all events undergone, fundamental change. We had traveled a considerable distance along the road which has led us from what was conceived as essentially a common law system, somewhat eroded by statutes, to what we have come to think of as essentially a statutory system in which the few remaining common law enclaves are no doubt destined to be gradually absorbed. Our attitudes toward statutes, as well as our ideas about appropriate drafting style, had notably changed. The 1950 codification was, then, a quite different animal from the 1900 codification. Admitting that, there is still profit to be derived from a consideration of the adventures and misadventures, most of them unexpected, which our first batch of codifying statutes experienced during their half-century on, as we say, the books.

A preliminary problem is why what we call "commercial law" was the subject matter of the first large scale experiment in codification in this country, as well as the only area of law which has, to date, gone through successive rounds of codification.

We use the term "commercial law" in a curiously restricted sense. It might be thought that the sale and financing of Blackacre and the multi-million dollar office building which has been, or is to be, built on Blackacre is quite as "commercial" as the sale and financing of an automobile or a piece of industrial equipment. But, in the vocabulary of any lawyer, as in the curriculum of any law school, "commercial law" stops well this side of Blackacre. This usage seems to have established itself more than a hundred years ago. It came in at the time of the first great debate on codification, which occupied the legal profession in this country from the 1820's until after the Civil War. The proponents of codification, who were both numerous and influential, regularly argued that the greatest benefits from a codification of the substantive law would be found in the area of "commercial contracts"—which became a term

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of art to designate the law of negotiable instruments, sales of goods and, somewhat later, personal property security transactions.

Thus commercial law and codification, even in their origins, were linked together like an odd pair of siamese twins. Both, indeed, were direct legacies from the eighteenth century Industrial Revolution and the banking system which it called into being. The manufacture and distribution of goods became almost overnight central to the proper functioning of the most dynamic and unstable society of which we have record. Almost overnight the relevant, supporting bodies of law were improvised, in an extraordinary outpouring of judicial energy. It is fair to say that there was no commercial law—that is, no body of law which the legal mind felt to be somehow distinct and separate and identifiable—much before 1800. Yet, less than half a century later, Justice Story, surely a qualified observer, could say that the rules of law relating to “commercial contracts” “have attained a scientific precision, and accuracy, and clearness, which give them an indisputable title to be treated as a fixed system of national jurisprudence.”<sup>1</sup>

Story and others suggested a codification—what he once called a “digest under legislative authority”—of this “fixed system of national jurisprudence” as a solution to two problems which were already bothersome and gave every sign of shortly becoming intolerable.<sup>2</sup> One problem was the increasing flood of case reports which, in a society become lawless from a surfeit of law, would soon make it impossible for any judge to declare the law or for any lawyer to advise his clients as to what the law was. The other problem was the progressive tendency toward local fragmentation of the substantive law in a federal system in which there was, it was occasionally declared on high authority, no common law of the United States and in which the United States Supreme Court was to exercise no control over the state courts in their determination of what the local version of the common law was to be.

These were real problems and real evils which required solution and remedy. The conscious thought of the period saw codification as the only way out of the impasse. We might indeed have had a general codification by 1850—in which case we would have inherited a quite different complex of legal traditions from those we have. The law, however, mysteriously provides its own solutions, although it may take us fifty or a hundred years to see that they were solutions. I suggest that three developments combined to make the abrupt remedy of a general codification unnecessary and to make a relatively pure common law system viable for fifty years after it might well have collapsed of its own weight.

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1. *Codification of the Common Law: A Report of the Commission . . . made to his Excellency the Governor [of Massachusetts], January, 1837*, in *Miscellaneous Writings of Joseph Story* 698, 730 (1852).

2. For an early discussion of these problems by Story, see his lengthy address: *On the Progress of Jurisprudence*, delivered to the Suffolk Bar Association in 1821, in *Miscellaneous Writings of Joseph Story* 198 (1852).

There was, in the first place, the rapid provision of a specifically American legal literature, which supplied an orderly statement of rule and principle in a form accessible to the practicing lawyer.<sup>3</sup> There was, secondly, the establishment of the handful of so-called national law schools which, both in their faculties and in their student bodies, represented a truly extraordinary concentration of talent. In their teaching, these schools seem, almost from the beginning, to have indoctrinated or brainwashed their students in the idea that there was such a thing as the true rule of law—a universal and unchanging absolute always and everywhere the same. As a matter of jurisprudence, the proposition was clearly untenable. As a description of what actually was going on in the United States, with its continental range and its melting-pot population, it was grotesque to the point of absurdity. As a device for promoting national uniformity in the law, it could not have been better designed. Thirdly, and most important, was the announcement in 1843 by a unanimous Supreme Court, in *Swift v. Tyson*,<sup>4</sup> of the doctrine of the general federal commercial law. The obvious solution to the problem of local diversity has always been federalization of the substantive law. We have never forthrightly adopted the federal solution; on the other hand, we have never been able to do quite without it and the federal principle has a way of rising stronger than ever from its own ashes each time it is ceremonially consigned to the funeral pyre. At all events the point about *Swift v. Tyson* is not the case itself, which was of almost no interest and could easily have been left to wither on the vine. The point is that the doctrine of the general federal commercial law was gratefully accepted in all quarters, lovingly tended and persuaded to flourish like the green bay tree. The Supreme Court of the United States became, and for fifty years remained, the country's leading commercial court—a surprising discovery for any lawyer who knows the Court only in its current guise.

These devices postponed the codification of commercial law for fifty years, so that, in the event, we got a codification vintage of 1900 instead of one vintage 1850. That made a good deal of difference—although the difference was essentially one of form, not substance. That, to any lawyer, should be enough. The life of the law, as Justice Holmes

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3. Kent's significantly entitled *Commentaries on American Law* were based on lectures which he delivered as Professor of Law in Columbia College, a post he had accepted in 1823 on his retirement from judicial office as Chancellor of the State of New York. The *Commentaries*, first published between 1826 and 1830, had run through four editions by 1840. Story's extraordinary series of treatises were based on the lectures which he gave at Harvard as Dane Professor of Law, a chair which he held from 1831 until his death in 1845. It is curious that the flood of specialized treatises which followed the landmark works of Kent and Story was mostly written by relatively obscure and undistinguished practitioners who did not hold any academic posts. There was evidently an insatiable demand for law books.

4. 41 U.S. (16 Pet.) 1 (1842).

might well have told us, has not been substance; it is, always has been and always will be, form.

An 1850 codification, we might think, would have been a disaster because in fact few of the propositions which had seemed true in 1850 as rules of sales law or of negotiable instruments law or of security law had survived until 1900 in anything like a recognizable form. Many of the rules, indeed, including the most basic ones, had in effect been replaced by their opposites. These reversals had been worked out by the courts with the aid of inherently flexible and increasingly refined case-law techniques. How could the job have been done at all if the courts had been hobbled by statutory fetters?

An 1850 codification would, I am sure, have had no effect whatever in preventing the necessary evolution and transformation of rules and principles. We know now that the 1900 codification had no such effect. We are already far enough into our experience with the 1950 codification—the Uniform Commercial Code—to be sure that it will have no more success than did its predecessors in stabilizing this remarkably unstable body of law.

Businessmen and their lawyers have always had an almost obsessive desire for certainty, and the predictability which results from certainty, in the law which regulates commercial transactions. Why this is so is easy to understand: there is a great deal of money at uncertain risk; it would be helpful to know what will happen if such and such a transaction is carried out in such and such a form. On the other hand, after a hundred and fifty years of experience, we can say with confidence that there are few, if any, areas of the law in which certainty and predictability are, and always have been, at such a premium and in which, the opinions of counsel to the contrary notwithstanding, sailing blind over uncharted seas is, and always has been, so recurrently the order of the day. Why this is so is also easy to understand. In the extraordinary dynamism, which has been the glory or despair of our industrialized society, the patterns and practices, the methods and techniques of “doing business” have, from the clearest of necessities, been in the highest degree unstable. Generation by generation, almost decade by decade, radically new problems have demanded radically new solutions. The law, a faithful reflector of whatever is, has simply mirrored the chronic instability of business practice.

The desire for certainty and predictability no doubt played a considerable role in gaining acceptance for the idea of a commercial codification in the first place and in actually bringing it about, not once but twice. Opponents of codification have always argued that a Code, specific enough to be meaningful, would have the undesirable effect of freezing the law as of the date of the Code's enactment. I have suggested that the problem is not a real one—that the freezing effect does not take place. The mirror image of that suggestion is that the fancied benefit

which will result from the Code—the anticipated gain in certainty and predictability—is not real either. Both the gains we had hoped for and the losses we had feared turn out to be largely illusory.

The codification of commercial law which we got after 1900 was at a far remove from the nineteenth century European Codes. The differences are attributable to timing and chronology much more than they are to differences between the American legal mind and the European or between a common law and a civil law system. An American codification in 1850 might well have been quite like the European model: comprehensive and designed to be, from the date of enactment, the exclusive source of law. At least that hypothesis is plausible in the light of the Field Codes, drafted during the 1850's for enactment in New York, which were very much in the European or civil law tradition.<sup>5</sup> I have suggested that the fifty-year delay in carrying out the codification made a great deal of difference in the all important matter of form: this is one of the points at which the delay seems to have been decisive.

Instead of a comprehensive Code of Commercial Law, we got a series of separate statutes, each purporting to deal with a bit or a piece or a fragment of the field, none of them purporting to state the whole law of the matter even with respect to its own bit or piece or fragment. These statutes were drafted under the sponsorship of the National Conference of Commissioners on Uniform State Laws, which was set up as a sort of subsidiary to the American Bar Association during the 1890's. Within ten or fifteen years the Conference promulgated uniform acts on negotiable instruments, sales, bills of lading, warehouse receipts, and stock transfers. All these acts were, in remarkably short order, widely enacted—some in all states, others in all but a handful of states. On the other hand, subsequent attempts by the Conference to codify the law of personal property security transactions met with relative failure.<sup>6</sup> It may be that the steam had gone out of the movement or that the material of security law, then in a state of violent and rapid flux, was intractable. At all events that part of the commercial complex was given another generation of non-uniform and largely case-law growth before being brought under the statutory yoke.

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5. For example, §6 of the Civil Code provided: "In this State there is no common law, in any case where the law is declared by the five Codes." (The five Codes were the Codes of Civil and Criminal Procedure, drafted by a so-called Practice Commission in 1849, the Political Code (1860), the Penal Code (1862) and the Civil Code (1864), the last three having been drafted by a so-called Code Commission appointed in 1857). With § 6 of the Field Code, compare the "common law saving clause" in the later Uniform Acts, discussed below at p. 466. On the "saving clause" of the Uniform Commercial Code, see p. 472 *infra*.

6. The Uniform Conditional Sales Act (1918) was, between 1919 and 1945, enacted in only eleven states. The Uniform Chattel Mortgage Act (1927) was never enacted anywhere. The Uniform Trust Receipts Act (1933) was widely enacted. However the success of the Trust Receipts Act was undoubtedly the result of a number of special circumstances. See 1 G. Gilmore, *Security Interests in Personal Property* § 4.3 (1965).

Thus in most of the country by 1920, and in many states as early as the 1900's, we had a codified law of sales, negotiable instruments, documents of title and security transfer. The several statutes, thanks no doubt to their common sponsorships, were loosely related even if they were in no sense integrated. They were on speaking terms even if they did not always speak the same language. These statutes were, truly, codifying statutes of a type we had not theretofore known. Between 1850 and 1900 there had been a great deal of legislative activity in the commercial law area. The law of sales and negotiable instruments had been moved a considerable distance from a pure common law base. But the earlier statutes had been narrow, specific and precise. For the first time, with the N.I.L. and the Sales Act, we get statutes which, for all their incompleteness, take a broad sweep; which do not deal merely with details of custom and practice; which provide a general framework for the whole of the relevant area of law.

We broke then with the European tradition by codifying bit by bit and piece by piece instead of all at once in a single swallow. But we broke with the older tradition even more significantly by making it expressly clear that our codifying statutes were not designed to be, and were not to be taken as, exclusive statements of all the law, past, present and future. From the N.I.L. on, each of the Uniform Acts contained a section captioned "Cases not Provided For by This Act" or some variant. The N.I.L. formula was:

In any case not provided for in this act the rules of law and equity including the law merchant shall govern.<sup>7</sup>

In the Sales Act the formula had become more elaborate:

In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy and other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.<sup>8</sup>

Thus the codifying statutes were not to swallow up the prestatutory law which was, over a broad range, in the Sales Act formulation, to "continue to apply." The statutes were to be, so to say, engrafted on the parent stock of the common law in the hope that graft and stock would continue, both vital, to grow together.

The general understanding of the profession seems to have been that the codifying statutes were merely declaratory of the common law—like the Restatements of the following generation. Since lawyers knew what the common law was, there was no particular reason for them to pay much attention to the statutory text or to take the statute seriously or even to take it as a statute. In the case of the Sales Act, this tendency was

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7. N.I.L. § 196.

8. Uniform Sales Act § 73.

reinforced by the fact that the draftsman, Professor Williston, promptly produced a magisterial treatise on sales to accompany the statute.<sup>9</sup> In the Sales Act case law nothing is more common than copious allusions to and quotations from Williston on Sales; nothing is rarer than a direct reference to the Sales Act itself; judicial analysis of the statutory text was almost non-existent. It is true that in this respect the N.I.L. suffered a somewhat different fate from the Sales Act—perhaps because no treatise of the stature of Williston on Sales was ever provided to serve as a gloss on the statute. At all events a few—not very many—sections of the N.I.L. came to be treated as holy writ, even though the rest of the statute could be taken lightly and largely disregarded.

We had then a series of loosely drafted statutes, which expressly kept open the possibility of further case law development and which were generally regarded as not much more than Restatements. The problem of living with such statutes under such circumstances was, we may conclude, not an intolerably difficult one—surely not as difficult as the problem which the courts will face in living with the Code during the second half of the century. But there is one more point about living with statutes, which is presumably as true now or next century as it was in 1900.

It is an unhappy fact of life that, while we can know the past only imperfectly, we know the future not at all. Our best informed guesses about what is going to happen next have an uncomfortable habit of missing the mark completely. These truisms may seem to make the lot of the statutory draftsman a particularly unhappy one. On another level of analysis, they may represent his justification and salvation—at least to the extent of guaranteeing that his statute will do no particular harm since it will in all probability have nothing, or almost nothing, to say about the issues which become the focus of litigation during its life. From our vantage point in time we can see a few examples of how this process worked out in the case of the turn of the century statutes.

The N.I.L. is the classical example of a statute devoted almost entirely to the resolution of once important issues which, even at the time the statute was drafted, had, in any significant statistical sense, lost all relevance for the current scene. Undoubtedly the central proposition of nineteenth century negotiable instruments law—which naturally became the heart of the codifying statute—was that the holder in due course of an instrument held it free of equities of ownership and of defenses. Now it is clear enough that due course holding or good faith purchase becomes a matter of importance, with respect to any type of property, only when that property is regularly bought and sold in a market and may be expected to pass from hand to hand in a series of transfers.<sup>10</sup> From sometime in

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9. The Sales Act was promulgated in 1906. The first edition of Williston on Sales was in 1909.

10. See Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 Yale L. J. 1057 (1954).

the eighteenth century<sup>11</sup> and for a hundred years or so thereafter mercantile bills of exchange and notes had in fact circulated in such a market; before the development of a modern system of bank credit, such paper was an indispensable supplement to a chronically inadequate supply of currency. The theory of due course holding was an obvious legal response to an obvious commercial need. For a hundred years this theory had in fact been the heart and center of negotiable instruments law. At the time the N.I.L. was drafted it had already ceased to be so—for the reason that bills and notes had, in statistically significant volume, ceased to circulate; bank checks, the most recent addition to the family of short-term money instruments, of course never had circulated. We need not insist, for the sake of paradox, that commercial paper had quite ceased to circulate in 1900.<sup>12</sup> The point is that negotiability—in the sense of due course holding—had become a matter of peripheral importance in most institutional lending transactions.

It is an occupational hazard of a draftsman, as he lovingly embalms the past, to fail to see what is going on before his eyes. In this respect too the N.I.L. offers us an instructive example.

We may say that the law of negotiable instruments has to do with the rules of law which regulate instruments which evidence either payment of debt or extension of credit. By 1900 the typical payment instrument had become the check and the check necessarily involves the relationship of people with banks as well as the relationships of banks among themselves. To the extent that notes and acceptances continued in use, it had become customary in this country to domicile them by making them "payable at" the maker's or acceptor's bank of deposit. It is hard to imagine any sort of instrument within the coverage of the N.I.L. which would not involve, at some point in its life history, the use of the banking system for collection, or the relationship between a bank and its customer, or both.

Bank collections and the bank-depositor relationship would have been, the intelligent analyst will assume, among the central preoccupations of the draftsman. The moral of the story is that the N.I.L. contains nothing whatever which is relevant either to the law of bank collections or to the bank-depositor relationship or which suggests that the draftsman even thought about either problem. Furthermore, most of the N.I.L.

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11. For an 18th century illustration, consider the life history of the bill of exchange which was the subject of litigation in *Peacock v. Rhodes*, 2 Dougl. 633, 99 Eng. Rep. 402 (K. B. 1781).

12. An instructive illustration of the progressive disappearance of mercantile paper from circulation can be found in the unsuccessful attempt by the Federal Reserve Board, prior to World War I, to revive the use of the mercantile bill of exchange under the name of "trade acceptance." See Farnsworth & Honnold, *Commercial Law (Cases and Materials)* 360 *et seq.* (1965). Despite an earnest attempt by the Federal Reserve to make the "trade acceptance" attractive to bankers, the bankers evidently preferred to finance short-term sales transactions by taking assignments of the seller's (non-negotiable) accounts receivable.



provisions on indorsement, transfer, presentment and payment (or dishonor), which made perfect sense with respect to the transactions the rules were designed to deal with, made little sense or nonsense or even a sort of anti-sense with respect to banks as holders, agents for collection and payors.<sup>13</sup> All these matters became the focus of a great deal of litigation during the N.I.L. period. Since the codifying statute was unhelpful and, indeed, in many respects positively harmful, there was need, as we endured the boom of the twenties and the gloom of the thirties, for a great deal of legislation, non-uniform and much of it hastily contrived, to remedy these glaring deficiencies.<sup>14</sup>

You may feel that the inadequacies of the N.I.L. are to be attributed to an unimaginative and incompetent draftsman—and indeed, so far as we know anything about the draftsman, there is good reason to believe that he was both unimaginative and incompetent. We are therefore fortunate in having the Sales Act as a companion piece, since its draftsman, Professor Williston, had, in the highest degree, all the qualities which, for the sake of argument, we may assume the N.I.L. draftsman to have lacked. Nevertheless, it is quite as true of the Sales Act as it is of the N.I.L. that the statute proved to be largely irrelevant to the issues which in fact provided the focus of litigation during the Sales Act. It may be added that nothing in the Sales Act proved to be as harmful as some of the N.I.L. provisions—which may be a measure of the draftsman's genius.

It has become a truism to say that the volume of sales litigation dropped sharply after 1900 or thereabouts. One explanation for the decline, which found favor among the proponents of a recodification, was that the law as codified in the Sales Act was so out of tune with the needs of this century, so anti-commercial, that the mercantile community fled the courts in favor of an extra-judicial resolution of their disputes by commercial arbitrators. Accepting the proposition that the Sales Act was out-of-date, I suggest that the decline in the volume of sales litigation was more apparent than real. There was just as much sales litigation as there ever had

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13. Perhaps the best single illustration of the N.I.L.'s "anti-sense" in a banking context was its treatment of so-called "restrictive indorsements" (in §§ 36, 37, 47) (the term includes indorsements "for deposit," "for collection" and so on). For the Code's bank-oriented reformulation of the problem, see §§ 3-205, 3-206, 4-203, 4-205.

14. The most widely enacted statute of this type was the Bank Collection Code drafted in 1928 under the auspices of the American Bankers Association and subsequently adopted in twenty states. The substance of the A.B.A. Code was also largely followed in comprehensive banking legislation adopted after World War II in such states as California and Texas, which did not enact the Code as such. The A.B.A. drafted its own Code following a basic policy disagreement with the National Conference of Commissioners on Uniform State Laws, which had undertaken to prepare a Uniform Bank Collection Act. After the split with the A.B.A., the Conference abandoned its project. For a critical evaluation of the A.B.A. Code, see Steffen, *The Check Collection Muddle*, 10 Tul. L. Rev. 537 (1936) (Professor Steffen had been the official draftsman of the ill-fated Uniform Bank Collection Act).

been. To much of the litigation the Sales Act contributed nothing and there was no need to cite it. Meanwhile the West Publishing Company, imprisoned in its own categories, digested the cases under Contracts, Agency and God only knows what other headings.

There was, for example, a great deal of litigation after 1900 about various types of long-term contractual arrangements: output contracts, requirements contracts, contracts with open or flexible pricing arrangements. In the state of law which the Sales Act reflected, the typical transaction was conceived to be a one-shot single delivery deal. The Act contained almost nothing relevant to the problems presented by long-term arrangements or forward contracts of sale.<sup>15</sup> These new types of contracts were, clearly enough, contracts for the sale of goods. It might therefore be assumed that decisions concerning their validity and proper construction would be thought of as belonging to the law of sales. Oddly, however, following the lead of the West Publishing Company, everyone agreed that these developments had nothing to do with sales law but were properly part of the undifferentiated law of general contracts.

The fact that the Sales Act largely ignored long-term contractual arrangements also led to curious results with respect to the calculation of damages for breach. The Sales Act damage rules were quite clearly geared to cases of breach at the time scheduled for performance and, for such cases, the rules made perfect sense.<sup>16</sup> In a long-term arrangement, however, breach will typically come at a time when the contract is, at least in part, executory: the contract, for example, is to run for five years and either seller or buyer repudiates after the first year. Application of the Sales Act damage rules to that situation would have produced legal chaos and economic nonsense. The courts, responding sensibly to a difficult situation, constructed a new set of damage rules without benefit of the Sales Act.<sup>17</sup> Indeed, by 1930 or so, the original Sales Act rules had been in many states lost, mislaid or forgotten so that, in the sales litigation spawned by the Great Depression, it is common to find the new set of judicially improvised damage rules applied not only to the case of advance

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15. Section 45 stated a rule of substantial performance with respect to the right to cancel so-called installment contracts: this section figured prominently in Sales Act case law and was the subject of a good deal of judicial discussion. See, e.g., the opinion of Cardozo, J., in *Helgar Corp. v. Warner's Features*, 222 N.Y. 449, 119 N.E. 113 (1918). As to open pricing arrangements, the Sales Act did in fact contain a well-drafted provision (§ 9); curiously, § 9 was almost entirely ignored in the litigation on pricing arrangements.

16. Thus the formula for recovery of the differential between the contract price and the market price on seller's failure to deliver or buyer's refusal to accept is geared (§§ 64, 67) to the date when the goods "ought to have been delivered" (or "accepted").

17. Comment, *A Suggested Revision of the Contract Doctrine of Anticipatory Repudiation*, 64 Yale L. J. 85 (1954), collects the Sales Act cases at p. 99 *et seq.* The author comments that the courts "have been as free in the computation of damages as if no statute were present." *Id.* at 99.

repudiation of executory contracts but also to the case of present breach. As with the requirements contracts and open price arrangements, the law relating to so-called anticipatory breach was thought of, not as sales law but as contract law.

We need not argue the point that sales law is concerned with the distribution of goods as they move from manufacturer or producer to the ultimate consumer. At different periods in our history different methods of distribution have been in use. During the first half of the nineteenth century the factor, or agent for sale, was an important figure in the distribution chain. Consequently there developed an enormous amount of learning about the law of factors and the relationship of the factor, his principal and the people who either bought from the factor goods consigned to him for sale or made loans to him on the security of the goods.<sup>18</sup> A Sales Act drafted in 1850 would have told us, in great detail, all about the institution of factoring. During the second half of the century the factor gradually lost his importance as a distribution agent and was replaced by a series of independent middlemen: goods now moved from the manufacturers through various levels of wholesale distributors to a retail outlet in a series of sales. Naturally sales law of the second half of the century tells us a good deal about these independent middlemen. Most of this learning passed into the Sales Act, which is quite as good on middlemen as our hypothetical 1850 Act would have been on factors.

After 1900 the independent middleman, like the factor before him, began to disappear from the commercial scene. Increasingly manufacturers began to control their own retail outlets—either directly or through franchise arrangements with dealers. The complicated relationship between manufacturer and dealer provoked a great deal of litigation. Except for the accident of codification, it is reasonable to assume that the franchised dealer, like his nineteenth century predecessors, would have become a significant figure in sales law. However, sales law in this century has been whatever happened to be covered in the Sales Act. Thus, while factors and middlemen, to the extent they survive, are figures in sales law, the franchised dealer is not.

Examples of this sort could easily be multiplied—not only for the Sales Act and the N.I.L. and their companions but for any codifying statute, whatever the time and place of its drafting and whatever the area of its coverage. Indeed I am sure that the same demonstration could be made quite as easily in the area we think of as public law—say, for the New Deal legislation of the 1930's—as in the area of private law which occupies us today. The truth of the matter is that we are always outwitted and surprised by what actually happens—which is on the whole an excellent thing.

Thus, we shall no doubt be surprised by what happens to the Uni-

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18. See the admirable discussion of factors in W. W. Story, *Sales* (1847).

form Commercial Code between now and the year 2000. We need not, however, forego speculation merely because the choice seems to lie between being wrong for the right reasons and right for the wrong reasons.

In what has now become the American tradition of codification, the Code incorporates the same form of common law saving clause which was included in the earlier statutes.<sup>19</sup> Even without the saving clause we may assume that the tradition would have imposed itself: the idea that a codifying statute comes not to supersede the common law but to coexist with it has become a part of our heritage, not to be gainsaid. If the Code had described itself as the exclusive source of law, we may doubt that the description would have been taken seriously, even for literary purposes. But it does not.

The Code purports to be an integrated and unified treatment of commercial law—which the earlier statutes neither purported to be nor were. No doubt some progress was made in this respect. It should be kept in mind, however, that the Code was the better part of twenty years in the drafting and that the world of the 1950's, when the project was finished, was, in some respects, a different world from the world of the 1930's, when it was begun. There are a good many discrepancies—internal self-contradictions—within the Code. Some of these could have been avoided if a more thoughtful and careful job of coordination had been done at the end. Others were inherent in the structure: even if the statute had been drafted by one hand, conceived and developed within a single brain, the solitary draftsman's responses in the 1950's would not at all points have squared with his responses in the 1930's. Consistency is not, to that extent the hobgoblin of any one's little mind. Thus the courts will still have work to do in reconciling the irreconcilable, harmonizing the disharmonies and so on. In this there is nothing surprising: it is what judges are paid to do.

Stylistically, the Code is at a far remove from the earlier statutes. It is tight where they were loose; precise where they were ambiguous; detailed and specific where they were vague and general. I am sure that codifying statutes which are loose, ambiguous, vague and general are to be preferred to codifying statutes which are tight, precise, detailed and specific. Here is a retrogression—no doubt an inevitable retrogression. This is the way a generation, weaned on the Internal Revenue Code, wants its statutes to be. The courts will just have to try harder.

There are, however, notable differences in style between the Articles of the Code which were first drafted—such as Article 2 on Sales—and the latter Articles—in particular, Article 9 on Secured Transactions. In style the Sales Article can, without much exaggeration, be said to be closer to its predecessor, the Uniform Sales Act, than it is to the Code Article on Secured Transactions. For this difference there is an explanation in the

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19. See U.C.C. § 1-103.

Code's drafting history. During the early years of drafting, practical men, involved in the real problems of the real world, paid little or no attention to the project: it was, like the Restatements, something which could safely be left to the law professors. By preference, perhaps for jurisprudential reasons, law professors, whether they are working on Restatement or Code, draft in a style of loose and vague generality; they are not much concerned with providing specific answers to specific questions; they are concerned with the erection of a conceptual framework which will at most, when a specific question is posed, serve as a guide to the range of possible answers. Practical men seem to have become aware of the Code and to have decided that they should do something about it only toward the end of the 1940's. A practitioner's instinctive preference, in drafting style, is at the opposite pole from the preference I have attributed to my own breed. He quite naturally wants the statute to answer, clearly and unequivocally, the questions which he wants to put. So far as the Code was concerned, the practitioners came too late to have much effect on those parts which, like the Sales Article, had been finished and, so to say, put on the shelf. The Code sponsors resisted any idea of a general re-examination of the work already accomplished; except in detail the Sales Article, as well as Article 3 on Commercial Paper, retained their original form and style. They will, therefore, be relatively easy to live with. The practitioners did have the opportunity to influence the drafting of the later Articles. In many respects, their participation was most helpful and the product was greatly improved by being subjected to intensive professional scrutiny and analysis. A less fortunate result was that the drafting style of the later Articles was greatly tightened up: the i's were dotted, the t's were crossed, the questions were answered. Nowhere was this process carried further than in the Article on Secured Transactions, which is already beginning to creak arthritically in more than one of its joints.

Substantively, the Code, as all statutes must, devotes most of its wordage to a recreation of the past. Indeed, in this respect, the Code outdoes its predecessors since, as a general drafting principle, everything that was in any of the earlier uniform commercial acts was carried over into the Code. Thus, all the nineteenth century rules, which were obsolete or obsolescent even in 1900, are lovingly preserved. There is nothing objectionable in this. It is what we might call the museum aspect of codification and is not without charm. It is unlikely that there will ever again be a case involving the seller's right to stop goods in transit on discovery of the buyer's insolvency; it is pleasant, nevertheless, to have a section on Stoppage in Transit which runs on for a full page of smooth, well-varnished prose, transporting us nostalgically back to the great days of railroading.<sup>20</sup> Naturally the Code also reproduces the events of the period between 1900 and

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20. U.C.C. § 2-705.

1950. Thus the requirements contracts and open price arrangements which were missing from the Sales Act make their appearance in the Code,<sup>21</sup> along with a good deal of material on formation and modification of contracts which the earlier statute had left to the general law.<sup>22</sup> Bank collections and the bank-depositor relationship, so strangely missing from the N.I.L., receive detailed—perhaps overly detailed—treatment in Article 4 of the Code. We may confidently expect that these Code innovations will, like their Victorian predecessors, lose interest as new and unexpected issues become the focus of future litigation.

The Code broke new ground in Article 9 on Secured Transactions. The earlier attempt to codify security law had met with an almost flat failure.<sup>23</sup> Most people who were involved with Article 9 in the drafting stage expected that the Article would arouse so much opposition and would occasion so much controversy that its presence might jeopardize enactment of the entire Code.<sup>24</sup> In fact there was almost no opposition, the Article received general acclaim and its presence was undoubtedly the principal reason why the Code was, within ten years, enacted throughout the country. The Article 9 story tells us, I think, something about the real benefits of a successful codification.

What can be done, when the time is ripe, is to achieve a simplification of apparent complexity. Personal property security law had in the 1940's reached an intolerable state: there seemed to be no end to the proliferation of new security devices and with each new growth the matted jungle of security law became more nearly impassable. Beneath the surface, however, a process of unification had been obscurely working itself out.<sup>25</sup> The separate security devices—conditional sale, chattel mortgage, trust receipt, factor's lien and so on—tended through time to lose their separate identities and to fuse or merge into each other. When the process had gone far enough, it was no great trick to cut away the tangle of underbrush and reveal the unified structure of security law that had already grown up. We should not forget the fate of the Uniform Chattel Mortgage Act of the 1920's, which proposed essentially the same sort of simplification and was never enacted anywhere. Retrospectively, we are in a position to say that the Chattel Mortgage Act came too soon: the underground process of unification had not gone far enough; the diversity still had deep roots; the tangle could not yet be cut away. Article 9 came at the right time and has had a success as spectacular as the earlier Act's failure.

The problems of living with the Code will, as in the past, to a considerable degree solve themselves as new issues appear with respect

21. See U.C.C. § 2-306 (Output, Requirements and Exclusive Dealings); § 2-305 (Open Price Term). On open price arrangements under the Uniform Sales Act, see note 15 *supra*.

22. See particularly U.C.C. §§ 2-202—2-210.

23. See note 6 *supra*.

24. See 1 G. Gilmore, *Security Interests in Personal Property* § 10.2 (1965).

25. See *id.* § 9.10.

to which the Code's positive provisions will, increasingly, have little relevance. The overspecificity of some of the Code Articles and its occasional rigidity of detail will no doubt prove bothersome. To the extent that it is true that the judges of our generation are more timid, less willing to innovate, more deferential to the legislative command than were the judges of half a century ago, the process of rewriting the statute through judicial decisions will become more difficult. I was, I must say, gloomier about this aspect of the problem ten years ago than I am today.<sup>26</sup> Since then two developments have considerably cheered me up.

One has been the spectacular rebirth of judicial creativity and energy. Judicial activism on the public law side has, within a generation, recast and rewritten great chunks of our constitutional law—not, it must be admitted, to universal acclaim. On the private law side the same pressures seem to have been at work—for example, in the elaboration of radically new theories of a manufacturer's liability to users of his defective products.<sup>27</sup> What had seemed to be a failure of judicial nerve after 1930 was evidently a merely temporary phenomenon: judges, it appears, are quite as willing to judge as they ever were.

The other has been the reappearance, after a short-lived eclipse, of the general federal commercial law: the announcement of its death in 1939 had evidently been exaggerated. The federalization can be seen in two somewhat different developments. The federal bankruptcy courts have become the principal forum for the resolution of novel issues of commercial law. The Bankruptcy Act of 1898 seems to have contemplated, when it was first enacted, a federal procedural framework for the liquidation (and later the reorganization) of insolvent estates, to be carried out according to state law rules of property and other rights. A notable feature of the history of bankruptcy law, particularly during the past twenty years, has been the gradual weakening of the state law component, the progressive strengthening of the federal law component.<sup>28</sup> The bankruptcy court has now a considerable degree of freedom in deciding what the law ought to be; it will in the future have even more freedom. The other development is the doctrine that federal, not state, law applies to any transaction to which the United States, in any of its manifold capacities, is a party.<sup>29</sup> That includes a considerable number of transactions. Needless to say, I do not expect to see the federal courts run roughshod over state law as represented by the Code. On the contrary, I would expect the federal courts to deal with the Code thoughtfully,

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26. See the discussion of what I then conceived to be the failure of judicial nerve in Gilmore, *Legal Realism: Its Cause and Cure*, 70 Yale L. J. 1037 (1961).

27. See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1966). Dean Prosser's excellent article collects the enormous recent literature.

28. See 2 G. Gilmore, *Security Interests in Personal Property* § 45.2 (1965).

29. See Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383 (1964).

intelligently and sympathetically. But I would also hope that, to avoid stumbling blocks, the federal courts will on occasion take advantage of their independence; if the results are sound, the state courts can be expected to follow.

It is unlikely that the Code will be left to the courts to anything like the extent that its predecessors were. Except for the N.I.L., the early uniform acts completed their fifty-year run in much the shape, or in any case form, they had been in to start with. The Code in all probability will be the subject of a continual process of legislative tinkering—partly because the spirit of the times looks instinctively to a legislative solution, partly because the overspecificity of some Articles of the Code will make such a solution necessary. The sponsors of the Code, for the past ten years or so, have adamantly resisted all suggestions for amendment or even restudy of the Code or any part of it. There have been a great many local amendments to the Uniform Text of the Code—particularly in such states as New York and California. Some of the amendments seem ill-conceived, quirky or even grotesque; others seem to be distinctly helpful improvements. The Editorial Board for the Code has, except for a few political concessions, impartially disapproved all amendments. Currently there appears to be some hope that the amendment problem will be better handled in the future than it has been in the past. The Editorial Board has at least established a committee to review Article 9 on Secured Transactions—which, partly because of its drafting style and partly, it may be, because of the nature of its subject matter, seems to have given rise to more problems than the rest of the Code put together.

Codification, we may conclude, is much more successful in abolishing the past than in controlling the future. The future will, by and large, take care of itself—if the courts won't, the legislatures will do whatever may be necessary. The true function of a codifying statute is to reduce the past to order and certainty—and, thus, to abolish it.<sup>30</sup> A state of law has, let us assume, been evolving through a period of time. There are a great many cases, each tied to its own peculiar set of facts. Assembling and studying the cases take a great deal of time and energy. There is room for disagreement on just how far the evolution has gone. A well-drafted codifying statute can greatly simplify this process. If the codifiers can perceive a unifying principle which underlies a surface diversity—as may have been the case with Article 9 of the Commercial Code—the resulting simplification will be dramatic. The statute provides a new starting point from which further exploration can be undertaken. The law will con-

30. "We ought not to permit ourselves to indulge in the theoretical extravagances of some well-meaning philosophical jurists, who believe that all human concerns for the future can be provided for in a code, speaking a definite language. Sufficient for us will be the achievement, to reduce the past to order and certainty; and that this is within our reach cannot be a matter of speculation." Story, *On the Progress of Jurisprudence* (Address to the Suffolk Bar Association, 1821), in *Miscellaneous Writings of Joseph Story* 198, 238 (1852).



tinue to evolve; new issues will appear in litigation; the statute will in time be buried under an accumulation of cases; the flood of cases will once again threaten to overwhelm us. The time will have come for another round of codification, in the course of which the recodifiers will point out that the old statutes were obsolescent, if not obsolete, when they were drafted. As indeed they were. If they had not been, they would have done a considerable amount of harm instead of, by way of simplification, a modest amount of good. If we keep a firm grasp on the basic principle of statutory obsolescence, we should have no more trouble in living with the Uniform Commercial Code than our predecessors had in living with the Sales Act and the N.I.L.